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Supreme Court, U.S.
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NO. 93-1703

In the Supreme Court of the United States

OCTOBER TERM, 1993

MAINLANDS SECTION 1 AND 2 CIVIC ASSOCIATION, INC.,
Petitioner

vs.

JOSEPH W. MASSARO and PATRICIA ANN MASSARO, individually and as parents and next friend of JOSEPH P. MASSARO and UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

for Respondents Joseph W. Massaro and Patricia Ann Masssaro, individually and as parents and next friend of Jeseph P. Massaro

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE HOLDING BELOW THAT POST-LITIGATION ATTEMPTS TO QUALIFY FOR THE HOUSING FOR OLDER PERSONS EXEMPTION FROM THE FAIR HOUSING ACT CANNOT EXCUSE PAST DISCRIMINATORY CONDUCT PRESENTS AN IMPORTANT AND UNDECIDED QUESTION OF FEDERAL LAW

II. WHETHER THE HOLDING BELOW THAT A HOUSING PROVIDER THAT BELATEDLY ADOPTED, BUT NEVER ENFORCED OR ADHERED TO AN AGE RESTRICTION IT ADMITTEDLY BELIEVED TO BE LEGALLY UNENFORCEABLE, HAS NOT COMPLIED WITH THE STATUTORY REQUIREMENT THAT IT PUBLISH AND ADHERE TO QUALIFYING POLICIES AND PROCEDURES TO SECURE THE HOUSING FOR OLDER PERSONS EXEMPTION FROM THE FAIR HOUSING ACT PRESENTS AN IMPORTANT AND UNDECIDED QUESTION OF FEDERAL LAW

III. WHETHER THE HOLDING BELOW THAT DIFFICULTIES IN PUBLISHING AND ADHERING TO QUALIFYING POLICIES AND PROCEDURES THAT ARISE FROM INTERNAL LIMITATIONS ON ASSOCIATION POWER AND STATE CIVIL RIGHTS LAWS DO NOT EXCUSE COMPLIANCE WITH THE FAIR HOUSING ACT PRESENTS AN IMPORTANT AND UNDECIDED QUESTION OF FEDERAL LAW.

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STATEMENT OF THE CASE

The Massaros sued petitioner for familial status discrimination under the Fair Housing Act, 42 U.S.C. § 3601-3617 when it sought to enforce a facially discriminatory deed restriction barring residence by children under 16. Respondent defended by claiming the home in which the Massaros resided was exempt from the Act's prohibition against familial status discrimination because the subdivision was housing for older persons as defined by 42 U.S.C. § 3607(b) (2) (C). The litigation focused upon one of the statutory prerequisites to the exemption — the requirement that a housing provider publish and adhere to policies and procedures demonstrating an intent to provide housing for person 55 years of age or older. 42 U.S.C. § 3607 (b) (2) (C) (iii).

Uncontroverted evidence established: 1) the Association first discriminated against the Massaros in September of 1989, 3 F.3d 1472, 1474-5; 2) the Association first adopted an age restriction limiting occupancy to 55 and older households in April of 1990, months after discriminating against the Massaros and only after the Massaros filed suit, 3 F.3d at 1475; and 3) the Association never sought to enforce or adhere to its belatedly adopted age restriction because it believed it to be legally unenforceable, 3 F.3d at 1480-82. On those undisputed facts, the Court of Appeals held the association did not satisfy the policies and procedures prong of the exemption, reasoning: 1) a housing provider cannot retroactively qualify for the statutory exemption for housing for older persons by adopting qualifying policies and procedures months after it commits a discriminatory housing practice, 3 F.3d at

1479-80, and 2) a housing provider cannot qualify for a statutory exemption which requires it to "adherence" to qualifying policies and procedures by adopting, but never enforcing or adhering to age restrictions it admittedly believed to be legally unenforceable, 3 F.3d at 1480-82.

ARGUMENT

I. THE HOLDING BY THE COURT OF APPEALS THAT POST-LITIGATION EFFORTS TO QUALIFY FOR AN EXEMPTION FROM THE FAIR HOUSING ACT CANNOT EXCUSE PAST DISCRIMINATORY CONDUCT PRESENTS NO QUESTION FOR REVIEW.

The Court of Appeals followed the plain language of the Fair Housing Act and prior decisions of this Court in holding a homeowners association liable to the Massaros for familial status discrimination under the Fair Housing Act. In clear but narrow language, the Court of Appeals held that: 1) a housing provider cannot retroactively qualify for the statutory exemption for housing for older persons by adopting qualifying policies and procedures months after it commits a discriminatory housing practice, and 2) a housing provider that belatedly adopted, but never enforced or adhered to age restrictions it admittedly believed to be legally unenforceable, cannot qualify for a statutory exemption conditioned upon proof that it adhered to qualifying policies and procedures.

Neither of the holdings below presesnts an issue worthy of review. Few principles are more firmly imbedded in civil rights jurisprudence than the rule that post litigation

efforts to comply with a civil rights statute do not excuse a previous violation. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 341 (1977) ("the company's later changes in its hiring and promotion policies could be of little comfort to the victims of its earlier post-Act discrimination, and could not erase its previous unlawful conduct or its obligation to afford relief to those who suffered because of it."). See also *Scott v. City of Anniston,* 597 F.2d 897 (5th Cir. 1979), *cert. denied,* 446 U.S. 917 (1980) (Later abandonment of discriminatory practice does not absolve defendant of liability to victims of practice); *HUD v. TEMS Ass'n Inc.,* Fair Housing-Fair Lending Rep. (P-H) ¶25,028 (HUD ALJ 1992) ("A housing provider cannot meet the policies and procedures requirement simply by amending its rules and regulations when it learns of a pending complaint against it.") Cf. 24 C.F.R. Ch.1, Subch. A, App. 1, at 589 (1992) (the Department "does not believe it would be faithful to the statute" to permit a housing provider to change its age requirements "at any time in order to exclude families with children.")

Because defendant did not enact and publish a qualifying age restriction until after the Massaros filed suit, the Court of Appeals properly held it liable to the Massaros under the Fair Housing Act. The association's argument that its pre-suit discrimination should be excused by its post-litigation bylaw amendments would encourage open disobedience of a remedial civil rights act, rewarding noncompliance even when it continues until after litigation begins. The association's argument ignores the intent of Congress to protect families with children and settled law determining the legality of discriminatory conduct by circumstances prevailing at the time of the discrimination.

In short, it presents no issue worthy of review.

In an effort to create an issue for review, the association repeatedly mischaracterizes the decision below. The Court of Appeals never held that Act requires a housing provider to assure that 100% of new households are 55 years of age or older (Pet. for Cert. at 6). The court of Appeals never reweighed conflicting trial evidence, (Pet. for Cert. at 12-16). Rather, the court below simply held that the association's own admissions that it never adopted an age restriction until months after discriminating against the Massaros, and that it never thereafter enforced or adhered to the restriction because it believed it to be unenforceable under Florida law, precluded its claim to the exemption.

II. THE HOLDING BY THE COURT OF APPEALS THAT THE ASSOCIATION'S ADMITTED FAILURE TO ADHERE TO ITS BELATEDLY ENACTED BYLAW INDEPENDENTLY BARRED ITS CLAIM TO THE EXEMPTION DERIVES FROM THE PLAIN TEXT OF THE ACT, AND PRESENTS NO QUESTION FOR REVIEW.

The decision below held that the association's admitted failure to adhere to its belatedly adopted bylaw independently barred its claim of exemption. The factual predicate for the holding is undisputed; the association conceded that it never sought to enforce its bylaw restricting occupancy to 55 and over households because it believed it to be unenforceable under Florida law. 3 F.3d at 1480-82, citing association testimony. The act limits its 55 and over exemption to housing providers who prove "*adherence to*"

qualifying policies and procedures. 42 U.S.C. § 3607 (b) (2) (C) (iii). The decision below rests upon the plain language of the Act and follows the oft repeated instructions "that a statute should be interpreted so as not to render one part inoperative," *Colautti v. Franklin,* 439 U.S. 379, 392 (1979) and requiring a court to "give effect, if possible, to every clause and word of a statute," *United States v. Menasche,* 348 U.S. 528, 538-39 (1955) (citation and internal quotations omitted). It therefore presents no issue for review.

III. DIFFICULTIES IN PUBLISHING AND ADHERING TO QUALIFYING POLICIES AND PROCEDURES TRACEABLE TO INTERNAL LIMITS ON ITS POWER AND FLORIDA CIVIL RIGHTS LAW DO NOT EXCUSE THE FAILURE OF THE ASSOCIATION TO QUALIFY FOR THE EXEMPTION.

In a final effort to create an issue for review, the association argues that it should be excused from the statutory exemption requirements because internal limits on its power and a state antidiscrimination statute forbade it from publishing and adhering to qualifying policies and procedures. (Pet. for Cert. at 10-11). The argument is doubly flawed. It is axiomatic that federal law exclusively governs defenses to federal claims. *Howlett v. Rose,* 496 U.S. 356, 375 (1990). Exempting petitioner from federal law on the basis of state law would create a "reverse" pre-emption doctrine, overturning the settled meaning of the Supremacy Clause. *See Adams Fruit Co. v. Barrett,* 494 U.S. 638, 647 (1990) (rejecting " 'reverse' pre-emption"). The Fair Housing Act does not pre-empt state civil rights

laws, 42 U.S.C. § 3615; or nondiscriminatory state property law, 24 C.F.R. Ch. 1, Subch. A, App. I at 902. Accordingly, Florida law cannot excuse petitioner's violation of federal law. The Court should deny the petition for certiorari.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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